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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1237

RICHARD E. BROWN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A43-A99), as amended (Pet. App. A102),[1] is reported

[1] Judge Adams amended one of the paragraphs of his concurring opinion on January 24, 1975 (Pet. App. A102). The paragraph set forth unamended at Pet. App. A74-A75 should thus read (508 F. 2d at 634-635, footnotes omitted):

> Based on this, plaintiffs argue that the failure to follow a statute's precise prescription makes a military judg-

at 508 F. 2d 618. The opinion of the district court (Pet. App. A1-A41) is reported at 365 F. Supp. 328.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1974 (Pet. App. A100-A101). A timely petition for rehearing was denied on January 31, 1975 (Pet. App. A103-A104). The petition for a writ of certiorari was filed on March 31, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the 1970 ruling of the United States Court of Military Appeals in *United States* v. *Greenwell*, 19 U.S.C.M.A. 460, 42 C.M.R. 62, that the Secretary of the Navy must act personally to authorize commanders of separate and detached commands to convene special courts-martial, should be applied retroactively to expunge convictions and grant back pay

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ment vulnerable. As to an initial challenge to a questionable practice, admittedly no fair reading of the Supreme Court cases could support a different result. Runkle v. United States and McClaughry v. Deming made clear that court-martial jurisdiction must be exercised in strict conformity with statutes, and therefore are strong support for the holding in *Greenwell*. However, extension of *Runkle* and *Deming* to the question whether retroactive operation is mandated is far from clear. In the cited cases the retroactivity issue was never raised. Hence, broad language in them regarding jurisdiction must not be read cavalierly as applying to a claim for full retroactive effect in a situation such as presently before us.

to persons convicted by such courts-martial under a prior, now invalid, delegation of authority.

2. Whether the ruling of the United States Court of Military Appeals in *United States* v. *Ferry*, 22 U.S.C.M.A. 339, 46 C.M.R. 339, that a pre-*Greenwell* special court-martial conviction may not be used to increase the sentence in a post-*Greenwell* court-martial proceeding, collaterally estops the United States from litigating the issue of *Greenwell's* retroactivity in a civil suit to expunge convictions from Naval records and for back pay.

STATUTES AND REGULATION INVOLVED

Article 23(a)(7) of the Uniform Code of Military Justice, 10 U.S.C. 823(a)(7) and the pertinent part of Section 0103b(5) of the Manual of the Judge Advocate General (as in effect at the time of petitioners' convictions) are reproduced at p. 4, *infra*.

STATEMENT

1. Petitioners Brown and Taylor, former enlisted members of the United States Marine Corps, were convicted in 1968 and 1969 of offenses under the Uniform Code of Military Justice [2] by special courts-martial convened by the commanding officers of their

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[2] Brown was convicted of aggravated arson under UCMJ Art. 126(a). Taylor was convicted on two separate occasions of absence without leave (aggregating approximately 14 months) under UCMJ Art. 86.

units.[3] The particular commanding officers were authorized to convene special courts-martial pursuant to a regulation of the Secretary of the Navy (Section 0103b(5) of the Manual of the Judge Advocate General) issued under Article 23(a)(7) of the Uniform Code of Military Justice, 10 U.S.C. 823(a)(7). Article 23(a)(7) provides:

> (a) Special courts-martial may be convened by—
>
> * * * * *
>
> (7) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

The Secretary's regulation, JAG Manual 0103b(5), provided in pertinent part:

> [T]he following officers are, under the authority granted to the Secretary of the Navy by article 23(a)(7) of the Code, empowered to convene special courts-martial:
>
> * * * * *
>
> (5) All commanding officers and officers in charge of commands now or hereafter designated as separate or detached commands by a flag or general officer in command * * *.

Petitioners' units, pursuant to this regulation, were designated as "separate or detached commands" by

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[3] Commanding Officer, Transient Facility, Camp Smedley D. Butler, U.S. Marine Corps, Okinawa (Major D. J. Hytrek, USMC); Commanding Officer, Student Company, Schools Battalion, Marine Corps Base, Camp Pendleton, California (Major F. X. Chambers, Jr., USMC). See Pet. App. A85 n. 42.

the general officer in command in each case.[4] At that time, it was generally assumed that JAG Manual 0103b(5) was an effective and valid implementation of UCMJ Art. 23(a)(7); that commanding officers and officers in charge of commands which were in fact "separate or detached," as designated by the flag or general officer in command, were thereby empowered by the Secretary of the Navy to convene special courts-martial; and that the commanding officers of petitioners' units were, accordingly, duly authorized to convene special courts-martial pursuant to UCMJ Art. 23(a)(7). Accordingly, neither Brown nor Taylor, nor their counsel, raised any question as to the legality of the convening authority in their court-martial proceedings, either initially or on direct review.[5]

The special court-martial convictions of both Brown and Taylor became final in 1969.[6] Brown was sentenced to 6 months confinement, forfeiture of $576, and a bad conduct discharge. Taylor was sentenced to 6 months confinement, forfeiture of $420, and a bad conduct discharge.

In 1970, subsequent to the finality of the military proceedings in Brown's and Taylor's cases, the United

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[4] Commander, Marine Corps Bases, Pacific (Lieutenant General V. H. Krulak, USMC); Commanding General, Marine Corps Base, Camp Pendleton, California (Major General L. J. Fields, USMC).

[5] Present counsel for Brown and Taylor was also their counsel in the Naval review proceedings.

[6] 18 U.S.C.M.A. 643 (Brown).

States Court of Military Appeals held that JAG Manual 0103b(5) was an invalid implementation of the Secretary's empowering authority under Article 23(a)(7) of the Code. *United States* v. *Greenwell*, 19 U.S.C.M.A. 460, 42 C.M.R. 62. The court held that the Secretary of the Navy "must act *personally* in conferring the power to convene special courts-martial," and that the method of conferring such power under JAG Manual 0103b(5), through the use of flag or general officers to designate which commands were "separate or detached," constituted an unlawful delegation of the Secretary's empowering authority under Article 23(a)(7). 19 U.S.C.M.A. at 463-464.[7] The court accordingly set aside Greenwell's special court-martial proceeding as a "nullity," and remanded the case with the mandate that "a new trial may be ordered before a properly appointed court-martial." *Id.* at 464.

Following the *Greenwell* decision the Secretary of the Navy rescinded JAG Manual 0103b(5) and thereafter personally authorized the commanding officers of numerous commands (including petitioners' commands) to convene special courts-martial (usually on the basis of a formal request by the flag or general officer in command). See Pet. App. A56 n. 7, A85 n. 42.

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[7] In *Greenwell* the Secretary assumed that his Article 23(a)(7) empowering authority could not be delegated to another. He argued that JAG Manual 0103b(5) did not involve any delegation but simply established an appropriate administrative procedure for determining which commands were in fact separate or detached, and thus within the Secretary's *en bloc* conferral of jurisdiction. See Pet. App. A51 n. 5.

2. In 1972 petitioner Brown brought the present civil action seeking a ruling that the *Greenwell* decision was retroactive, that his own court-martial proceeding was a nullity, and that he was therefore entitled to recover his forfeited pay ($576) and to have his military record corrected to show an honorable discharge.[8] Petitioner Taylor intervened and sought similar relief. Petitioners also sought to have the cause certified as a class action on behalf of an estimated 20,000 other servicemen convicted by "ineffectively or improperly" convened special courts-martial from the enactment of the Uniform Code of Military Justice in 1950 to 1970 when *Greenwell* was decided.[9]

The district court held that petitioners' collateral attack on their court-martial convictions was not barred by the UCMJ finality provision (Article 76) (Pet. App. A10-A13), and that a class action was proper for those servicemen whose courts-martial were convened pursuant to JAG Manual 0103b(5), *i.e.*, from 1966 (when 0103b(5) was last amended) to 1970 (when 0103b(5) was invalidated in *Greenwell*).[10] However, on the merits, the district court,

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[8] Pet. App. A44. The Court of Military Appeals authorized only a retrial in Greenwell's case. Because Brown was an ex-serviceman in 1972, he was not subject to retrial. See Pet. App. A88 n. 50a; *Toth* v. *Quarles*, 350 U.S. 11.

[9] Complaint, paragraphs 15-18.

[10] Pet. App. A41-A42. The district court adopted October 29, 1965, as the starting date for the class. Under the court of appeals mandate this date will probably be changed to April 5, 1966. See Pet. App. A60-A61.

while recognizing that *Greenwell* was a "jurisdictional" ruling, rejected petitioners' contention that the decision should be applied retroactively, holding that (Pet. App. A40):

> [W]hen a jurisdictional defect springs from a technical failure to empower a tribunal, and that tribunal could have been properly empowered, and * * * when the mistake which led to the jurisdictional failure was a reasonable mistake, made in good faith, with no hint of an intentional improper assumption of power, or a stiff-backed resistance to the clear mandate of existing law, * * * then a court may consider applying the decision which strikes down such jurisdiction only prospectively.

In a 2-1 decision the court of appeals affirmed (Pet. App. A43-A101). Relying on a prior decision,[11] the court of appeals held that a ruling relating to jurisdiction need not *ipso facto* be applied retroactively (Pet. App. A52-A55). The court analyzed the retroactivity claim under the functional tests utilized by this Court in cases such as *Stovall* v. *Denno*, 388 U.S. 293, and held that, because *Greenwell* was concerned only with conforming the procedures for convening special courts-martial to a strict interpretation of the statute, and had no relation to the guilt-determining processes of the court-martial itself, retroactive application would serve no legitimate pur-

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[11] *McSparran* v. *Weist*, 402 F. 2d 867 (C.A. 3, *en banc*), certiorari denied *sub nom. Fritzinger* v. *Weist*, 395 U.S. 903. See Pet. App. A54.

pose (Pet. App. A56-A57). In addition the court considered that there was significant reliance by naval authorities on the pre-*Greenwell* implementation of Article 23(a)(7), and that invalidation of pre-*Greenwell* convictions in circumstances where retrial was no longer possible or practicable would have an unwarranted negative effect on the administration of justice (Pet. App. A58-A59).

In a concurring opinion (Pet. App. A61-A89) Judge Adams, analyzing the purposes of retroactivity and the factual context of this case, considered the present case weaker than *Gosa* v. *Mayden*, 413 U.S. 665, for retroactivity (Pet. App. A78) and concluded that the retroactivity of *Greenwell* sought here was not warranted (Pet. App. A89). Judge Garth in dissent (Pet. App. A89-A99) expressed his view that "a decision relating to adjudicatory power, must be applied retroactively" (Pet. App. A99).

ARGUMENT

The decision of the court of appeals treats exhaustively and soundly all aspects of petitioners' claims. Those claims were properly resolved by the court of appeals and do not call for further review by this Court. Contrary to petitioners' suggestions, there is no conflict with prior decisions of this Court, nor with the decisions of any other court. Other than the courts below, no court has ruled on the specific question involved here—whether *United*

States v. *Greenwell* should be applied retroactively to expunge convictions and grant back pay to servicemen convicted by special courts-martial invoked under pre-*Greenwell* procedures. There is no known pending or potential litigation in the lower federal courts which would be affected or eliminated by any further ruling from this Court on the retroactivity of *Greenwell*.[12] Moreover, the unique context of jurisdiction in this case and the nature of the defect make it an inappropriate vehicle to resolve more general problems of "jurisdictional" retroactivity.

1. Petitioners do not argue that they may have been unjustly convicted, or that the decision below has any significant effect on other litigation in the federal courts, or on the administration of military justice in the future. Their chief argument is the abstract contention that the decision below conflicts with various prior decisions of this Court, or, more particularly, with certain language in those decisions. Petitioners quote extensively from *Wise* v. *Withers*, 3 Cranch 331; *Dynes* v. *Hoover*, 20 How. 65; *Runkle* v. *United States*, 122 U.S. 543; *McClaughry* v. *Deming*, 186 U.S. 49; and *Ex parte Milligan*, 4 Wall. 2.

While those decisions require strict construction of military statutes relating to the composition and proceedings of courts-martial, and typically cast their holdings in jurisdictional terms, not one of them con-

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[12] There would be little likelihood of further litigation of *Greenwell's* retroactivity in other circuits, in view of the class nature of the decision. See Pet. App. A60 n. 10.

siders a question of *retroactive* application of a ruling involving a court-martial. Thus, in *McClaughry* v. *Deming*, *supra*, this Court sustained a collateral attack on the conviction of a Volunteer Army officer by a court-martial composed of Regular Army officers because a statute forbade officers of the Regular Army from sitting on courts-martial to try officers or soldiers "of other forces." The government appears to have argued that "other forces" meant other than the Army of the United States (*i.e.*, militia forces, other services, *etc.*), but not other branches of the same service (*i.e.*, Volunteer Army).[13] *Deming*, however, like the other cases cited by petitioners, was an initial attack on a particular practice; it did not involve a claim for retroactive application, although there may have been numerous past instances of the same practice. See the concurring opinion of Judge Adams (*supra*, pp. 1-2 n. 1). Since the considerations involved in determining whether a particular practice or interpretation should be changed for the future, are not necessarily the same as those involved in determining whether all past consequences, direct or indirect, of that practice should be uprooted, the cases cited by petitioners, involving an *initial* attack on a particular interpretation, do not reach the question here.[14]

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[13] See *Deming* v. *McClaughry*, 113 Fed. 639, 641, 645-646 (C.C.A. 8); 30 Stat. 361.

[14] Likewise the Manual for Courts-Martial, also relied on by petitioners (Pet. 16 n. 9), is concerned with direct review proceedings and does not purport to state the law on retroactivity questions.

2. Petitioners next argue that because this case involves a question of "pure" jurisdiction,[15] the functional tests for determining retroactivity set forth in *Linkletter* v. *Walker*, 381 U.S. 618, and in *Stovall* v. *Denno*, *supra*, are inapplicable (Pet. 17). Petitioners cite *Robinson* v. *Neil*, 409 U.S. 505, and *United States* v. *United States Coin & Currency*, 401 U.S. 715, as supporting their view. But those cases gave retroactive application to rulings of this Court ending criminal liability, as violative of the Constitution, for the persons in question (because of double jeopardy in *Robinson* and compulsory self-incrimination in *Coin & Currency*).[16] In the present case, in contrast, individuals whose courts-martial were convened pursuant to the regulations struck down in *Greenwell* are, so far as *Greenwell* is concerned, fully

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[15] The term "pure" jurisdiction is a label used by petitioners. The decision in *Greenwell* does not use that phrase. The court of appeals characterized *Greenwell* as involving a "jurisdictional issue" (Pet. App. A57 n. 7a) but analyzed that decision in terms of its purpose (Pet. App. A56-A57). See also the concurring opinion at Pet. App. A65 and the opinion of the district court at Pet. App. A30-A34. Additionally see F. S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935).

[16] In *Robinson* this Court held that retroactivity was required because the effect of the double jeopardy clause "is to prevent a trial from taking place at all * * *." 409 U.S. at 509. In *Coin & Currency* the Court explained that its prior rulings striking down statutory provisions which had the effect of compelling gamblers to file self-incriminating statements "dealt with the kind of conduct that cannot constitutionally be punished in the first instance," *i.e.*, conduct that was constitutionally immune from punishment." 401 U.S. at 723, 724.

subject to retrial.[17] See Pet. App. A55 n. 6. *Greenwell* dealt only with the correct manner by which the Secretary of the Navy could confer a clearly existing power on an otherwise appropriate court (Pet. App. A56). Unlike the situation in *Robinson* and *Coin & Currency*, *Greenwell's* purpose was not to establish immunity from prosecution or further prosecution; there is, accordingly, no such purpose to vindicate through retroactive application of *Greenwell*.[18]

Petitioners' reliance on *Gosa* v. *Mayden*, 413 U.S. 665, involving retroactivity of *O'Callahan* v. *Parker*, 395 U.S. 258, is likewise misplaced. The plurality opinion in *Gosa* did not deny that the actual effect of *O'Callahan* was to deprive *all* military courts of jurisdiction to convict servicemen for offenses which are not service connected. *Greenwell* on the other hand, deals only with the proper invocation of an authority admittedly existing. It therefore presents

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[17] Brown and Taylor are presently immune from retrial, not because of *Greenwell*, but because they are no longer in the service. See *Toth* v. *Quarles*, 350 U.S. 11.

[18] The government doubts the correctness of *Greenwell* and contested its correctness in the district court, although not in the court of appeals. See Pet. App. A85 n. 43. If certiorari should be granted, the government would reserve its right to argue in the alternative that the court of appeals decision should be affirmed on the ground that *Greenwell* was incorrectly decided, *i.e.*, that JAG Manual 0103b(5) did not constitute an unlawful delegation of the Secretary's convening power under UCMJ Art. 23(a)(7). See *Gosa* v. *Mayden*, 413 U.S. 665, 692 (Rehnquist, J., concurring); *Dandridge* v. *Williams*, 397 U.S. 471, 476 n. 6.

a far less compelling case for retroactivity than *O'Callahan*.

Bell v. *United States*, 366 U.S. 393, relied upon by petitioners (Pet. 20-22) is not controlling. There the Court held that prisoners of war could not be denied military pay on allegations that they had aided the enemy where they had not been court-martialled at all. No question of retroactively setting aside a proceeding arguably valid when held was involved. See Pet. App. A86 n. 47 (concurring opinion of Judge Adams).

3. Petitioners argue that the decision of the court of appeals conflicts with the decision of the Seventh Circuit in *Brough* v. *United States*, 454 F. 2d 370.[19] In *Brough* the Seventh Circuit held retroactive a ruling by this Court (*Toussie* v. *United States*, 397 U.S. 112) that the 5-year statute of limitations for failure to register for the draft ran from the date the offense began, *i.e.*, from 5 days after an individual's 18th birthday. The effect of *Toussie* was thus to end an individual's criminal liability for this offense 5 days after he reached age 23, unless prosecution had been commenced. The Seventh Circuit held that convictions of similarly situated previously-convicted individuals should also be set aside.

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[19] *Brough* was relied on by petitioners in a footnote of their court of appeals brief for the Blackstonion proposition that a judicial ruling declares the law as it "always was" (Br., p. 26 n. 31). Compare *Linkletter* v. *Walker*, 381 U.S. 618, 622-629; Chafee, *Do Judges Make or Discover Law?*, 91 Proc. Am. Philos. Soc. 405 (1947).

In its *opinion* the Seventh Circuit stated that while Constitutional decisions may or may not be retroactive (because of the development of the meaning of the Constitution), statutory interpretations must always be retroactive because "a statute * * * can have only one meaning." 454 F. 2d at 372. The *decision* in *Brough*, however, is necessarily less broad and the decision is not in conflict with the decision here. As we noted earlier, *Greenwell* did not end the criminal liability of a class of individuals. *Toussie* did. The purpose of *Toussie* thus presented a far more compelling case for retroactive application than did the ruling in *Greenwell*. The two cases are wholly distinguishable in the factual situations and statutes considered. The holdings in *Brough* and this case, accordingly, present no occasion for this Court to exercise its power to resolve conflicts among the courts of appeals.[20]

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[20] Nor is there any conflict with *Donivan* v. *Henderson*, 506 F. 2d 434 (C.A. 5), holding retroactive this Court's decision in *Wingo* v. *Wedding*, 418 U.S. 461, that magistrates (non-Article III judges) could not conduct evidentiary hearings in *habeas corpus* cases. The court of appeals in *Donivan* applied the functional tests set forth in *Stovall* and concluded that "the factors supporting retroactivity weigh heavier in the balance." The court of appeals was "[p]articularly swayed by the purpose to be served by *Wingo*—proper finding of facts crucial to the truth." 506 F. 2d at 435. This reasoning is fully consistent with the opinion of the court of appeals in this case—that *Greenwell's* purpose "was not intended to improve the fact-finding procedures employed at the court-martial itself" (Pet. App. A57). See also *Daniel* v. *Louisiana*, No. 74-5369, decided January 27, 1975.

4. Finally, petitioners argue that under principles of collateral estoppel the court of appeals should have held *Greenwell* fully retroactive on the basis of *United States* v. *Ferry*, 22 U.S.C.M.A. 339, 46 C.M.R. 339, in which the Court of Military Appeals ruled that a pre-*Greenwell* conviction could not be used to increase a sentence in a post-*Greenwell* court-martial.

The court of appeals, however, correctly held that *Ferry* did not collaterally estop the government from defending against the broad retroactivity of *Greenwell* asserted by petitioners in this case (Pet. App. A47-A49, see also A79-A82).[21] In the first place, the court in *Ferry* in deciding that a past conviction by a court-martial convened contrary to *Greenwell* could not be used to increase a sentence in a pending case, expressly declined to decide what "effect *Greenwell* may have on a conviction in other situations" (Pet. App. A48; 22 U.S.C.M.A. at 340).

Moreover, *Ferry* decided an issue of law, not an issue of fact or mixed fact and law. This Court stated in *United States* v. *Moser*, 266 U.S. 236, 242:

> [T]he doctrine of *res judicata* * * * does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases.

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[21] The court of appeals was unanimous that the government was not barred by collateral estoppel.

For both of these reasons the *Ferry* ruling does not effect a collateral estoppel in the present case.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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